



Copyright Office

37 CFR Part 201

[Docket No. 2023-5]

Exemptions to Permit Circumvention of Access Controls on Copyrighted Works

AGENCY: U.S. Copyright Office, Library of Congress.

ACTION: Notice of proposed rulemaking.

SUMMARY: The United States Copyright Office is conducting the ninth triennial rulemaking proceeding under the Digital Millennium Copyright Act (“DMCA”), concerning possible temporary exemptions to the DMCA’s prohibition against circumvention of technological measures that control access to copyrighted works. In this proceeding, the Copyright Office is considering petitions for the renewal of exemptions that were granted during the eighth triennial rulemaking along with petitions for new exemptions to engage in activities not permitted by existing exemptions. On June 8, 2023, the Office published a Notification of Inquiry requesting petitions to renew existing exemptions and comments in response to those petitions, as well as petitions for new exemptions. Having carefully considered the renewal petitions and comments received, in this Notice of Proposed Rulemaking (“NPRM”), the Office announces its intention to recommend all but one of the existing exemptions for renewal. This NPRM also initiates three rounds of public comment on the newly proposed exemptions. Interested parties are invited to make full legal and evidentiary submissions in support of or in opposition to the newly proposed exemptions, in accordance with the requirements set forth below.

DATES: Initial written comments (including documentary evidence) and multimedia evidence from proponents and other members of the public who support the adoption of a proposed exemption, as well as parties that neither support nor oppose an exemption but seek to share pertinent information, are due December 22, 2023. Written response

comments (including documentary evidence) and multimedia evidence from those who oppose the adoption of a proposed exemption are due February 20, 2024. Written reply comments from supporters of particular proposals and parties that neither support nor oppose a proposal are due March 19, 2024.

ADDRESSES: The Copyright Office is using the [regulations.gov](https://www.regulations.gov) system for the submission and posting of comments in this proceeding. All comments are therefore to be submitted electronically through *regulations.gov*. The Office is accepting two types of comments. First, commenters who wish briefly to express general support for or opposition to a proposed exemption may submit such comments electronically by typing into the comment field on [regulations.gov](https://www.regulations.gov). Second, commenters who wish to provide a fuller legal and evidentiary basis for their position may upload a Word or PDF document, but such longer submissions must be completed using the long-comment form provided on the Office’s website at <https://www.copyright.gov/1201/2024>. Specific instructions for submitting comments, including multimedia evidence that cannot be uploaded through [regulations.gov](https://www.regulations.gov), are also available on that webpage. If a commenter cannot meet a particular submission requirement, please contact the Office using the contact information below for special instructions.

FOR FURTHER INFORMATION CONTACT: Rhea Efthimiadis, Assistant to the General Counsel, by email at meft@copyright.gov or by telephone at (202) 707–8350.

SUPPLEMENTARY INFORMATION:

On June 8, 2023, the Office published a Notification of Inquiry (“NOI”) requesting petitions to renew current exemptions, oppositions to the renewal petitions, and petitions for newly proposed exemptions in connection with the ninth triennial section 1201 rulemaking.¹ In response, the Office received thirty-eight renewal petitions,

¹ *Exemptions To Permit Circumvention of Access Controls on Copyrighted Works*, 88 FR 37486 (June 8, 2023) (“2023 NOI”). On July 5, 2023, the Office issued a Notice of Inquiry extending

six comments in opposition to renewal of an exemption, and two comments supporting renewal of an exemption.² In addition, the Office received eleven petitions for new exemptions or expansion of previously granted exemptions.

This NPRM summarizes the renewal petitions and sets forth which exemptions the Office intends to recommend for renewal without the need for petitioners to further develop the administrative record. Separately, this NPRM outlines the proposed classes for new exemptions for which the Office is initiating three rounds of public comment.

I. Standard for Evaluating Proposed Exemptions

As the NOI explained, before the Office can recommend a temporary exemption from the prohibition on circumvention, the record must establish that “persons who are users of a copyrighted work are, or are likely to be in the succeeding 3-year period, adversely affected by the prohibition . . . in their ability to make noninfringing uses under [title 17] of a particular class of copyrighted works.”³ When defining a “class of copyrighted works,” the Office generally uses the categories of works in 17 U.S.C. 102 as a starting point and then refines the class by other criteria, such as the technological protection measures (“TPMs”) used, distribution platforms, and/or types of uses or users.⁴

the comment submission period for petitions for new exemptions. *Exemptions To Permit Circumvention of Access Controls on Copyrighted Works: Notice and Request for Public Comment*, 88 FR 42891 (July 5, 2023).

² The comments received in response to the Notification of Inquiry are available at <https://www.regulations.gov/document/COLC-2023-0004-0002/comment> and on the Copyright Office website. Renewal petitions are available at <https://www.copyright.gov/1201/2024/petitions/renewal/>, and petitions for new exemptions are available at <https://www.copyright.gov/1201/2024/petitions/proposed/>. References to renewal petitions and comments are by party name (abbreviated where appropriate) and a brief identification of the previously granted exemption, followed by either “Renewal Pet.,” “Supp.” (for comments supporting an exemption), or “Opp.” (for comments opposing an exemption). References to petitions for new exemptions are by party name (abbreviated where appropriate), the Office’s proposed class number, and “Pet.”

³ 17 U.S.C. 1201(a)(1)(C).

⁴ See U.S. Copyright Office, Section 1201 Rulemaking: Eighth Triennial Proceeding to Determine Exemptions to the Prohibition on Circumvention, Recommendation of the Register of Copyrights 8–9 (2021) (“2021 Recommendation”); U.S. Copyright Office, Section 1201 of Title 17, at 26, 108–10 (2017), <https://www.copyright.gov/policy/1201/section-1201-full-report.pdf>

In evaluating the evidence, the Office weighs the statutory factors in section 1201(a)(1)(C): “(i) the availability for use of copyrighted works; (ii) the availability for use of works for nonprofit archival, preservation, and educational purposes; (iii) the impact that the prohibition on the circumvention of technological measures applied to copyrighted works has on criticism, comment, news reporting, teaching, scholarship, or research; (iv) the effect of circumvention of technological measures on the market for or value of copyrighted works; and (v) such other factors as the [Office] considers appropriate.”⁵ After developing a comprehensive administrative record, the Register of Copyrights makes a recommendation to the Librarian of Congress concerning whether exemptions are warranted based on that record.

In considering whether to recommend an exemption, the Office follows the statutory text: “*Are users of a copyrighted work adversely affected by the prohibition on circumvention in their ability to make noninfringing uses of a class of copyrighted works, or are users likely to be so adversely affected in the next three years?*”⁶ This inquiry breaks down into the following elements:

- Does the proposed class include at least some works protected by copyright?
- Are the uses at issue likely noninfringing under title 17?
- Are users currently, or likely to be, adversely affected in their ability to make such noninfringing uses during the next three years?⁷
- Is the statutory prohibition on circumventing access controls the cause of the adverse effects?⁸

(“Section 1201 Study”); *see also* H.R. Rep. No. 105-551, pt. 2, at 38 (1998) (“Commerce Comm. Report”) (“The Committee intends that the ‘particular class of copyrighted works’ be a narrow and focused subset of the broad categories of works of authorship than is identified in Section 102 of the Copyright Act (17 U.S.C. 102).”).

⁵ 17 U.S.C. 1201(a)(1)(C).

⁶ Section 1201 Study at 114.

⁷ This element is analyzed in reference to section 1201(a)(1)(C)’s five statutory factors.

⁸ Section 1201 Study at 115–27.

To determine whether a proposed use is likely to be noninfringing, the Register considers the Copyright Act and relevant judicial precedents.⁹ When considering whether such uses are being adversely impacted by the prohibition on circumvention, the rulemaking focuses on “distinct, verifiable, and measurable impacts” compared to “*de minimis* impacts.”¹⁰ The Register examines the administrative record as a whole to consider whether the preponderance of the evidence shows that the conditions for granting an exemption have been met.¹¹

II. Review of Petitions to Renew Existing Exemptions

In this proceeding, the Office is again using a streamlined process for recommending the renewal of exemptions previously issued by the Librarian of Congress. As the Office explained in its 2017 policy study, the “Register must apply the same evidentiary standards in recommending the renewal of exemptions as for first-time

⁹ *Id.* at 115–17. While controlling precedent directly on point is not required to justify an exemption, there is no “rule of doubt” favoring an exemption when it is unclear that a particular use is fair or otherwise noninfringing. *See* U.S. Copyright Office, Section 1201 Rulemaking: Sixth Triennial Proceeding to Determine Exemptions to the Prohibition on Circumvention, Recommendation of the Register of Copyrights 15 (2015) (“2015 Recommendation”). The rulemaking also generally “is not an appropriate venue for breaking new ground in fair use jurisprudence.” 2021 Recommendation at 10–11 (quoting Section 1201 Report at 116–17).

¹⁰ Commerce Comm. Report at 37; *see also* Staff of H. Comm. on the Judiciary, 105th Cong., Section-by-Section Analysis of H.R. 2281 as Passed by the United States House of Representatives on August 4th, 1998, at 6 (Comm. Print 1998) (using the equivalent phrase “substantial adverse impact”); *see also, e.g.*, Section 1201 Study at 119–21 (discussing same and citing application of this standard in five prior rulemakings).

¹¹ *See* 17 U.S.C. 1201(a)(1)(C) (asking whether users “*are, or are likely to be* in the succeeding 3-year period, adversely affected by the prohibition [on circumvention] in their ability to make noninfringing uses”) (emphasis added); Section 1201 Study at 111–12; *see also Sea Island Broad. Corp. v. FCC*, 627 F.2d 240, 243 (D.C. Cir. 1980) (noting that “[t]he use of the ‘preponderance of evidence’ standard is the traditional standard in civil and administrative proceedings”); *Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies*, 70 FR 57526, 57528 (Oct. 3, 2005); 2021 Recommendation at 7–8; U.S. Copyright Office, Section 1201 Rulemaking: Seventh Triennial Proceeding to Determine Exemptions to the Prohibition on Circumvention, Recommendation of the Acting Register of Copyrights 13 (2018) (“2018 Recommendation”); 2015 Recommendation at 13–14; U.S. Copyright Office, Section 1201 Rulemaking: Fifth Triennial Proceeding to Determine Exemptions to the Prohibition on Circumvention, Recommendation of the Register of Copyrights 6 (2012) (“2012 Recommendation”); U.S. Copyright Office, Section 1201 Rulemaking: Second Triennial Proceeding to Determine Exemptions to the Prohibition on Circumvention, Recommendation of the Register of Copyrights 19–20 (2003).

exemption requests,” and the statute requires that “a determination must be made specifically for each triennial period.”¹² The Office further determined that “the statutory language appears to be broad enough to permit determinations to be based upon evidence drawn from prior proceedings, but only upon a conclusion that this evidence remains reliable to support granting an exemption in the current proceeding.”¹³ The Office first instituted this streamlined renewal process in the seventh triennial rulemaking, which concluded in 2018.¹⁴ In that rulemaking, the Office received requests to renew each of the exemptions from the previous proceeding, none of which were meaningfully contested.¹⁵ As a result, it was able to recommend renewal of all previously granted exemptions.¹⁶ The streamlined renewal process was praised by participants during the ensuing rulemaking,¹⁷ and the Office has employed it in subsequent rulemakings.

The Office is following the same procedure in this rulemaking. Renewal petitions must be for exemptions as they are currently formulated, without modification. Petitions should support a determination by the Office that, due to a lack of legal, marketplace, or technological changes, the factors that led it to recommend adoption of the exemption in the prior rulemaking may still be relied on to renew the exemption.¹⁸ To the extent that any renewal petition proposes uses beyond the current exemption, the Office disregards those portions of the petition for purposes of considering the renewal of the exemption, and instead focuses on whether the petition provides sufficient information to warrant renewal of the exemption in its current form.

¹² Section 1201 Study at 142, 145.

¹³ *Id.* at 143.

¹⁴ 2018 Recommendation at 17.

¹⁵ *Id.* at 22.

¹⁶ *Id.* at 19.

¹⁷ *See, e.g., id.* at 19 n.80 (collecting transcript testimony from 2018 rulemaking).

¹⁸ *See* Section 1201 Study at 143–44.

In response to its current NOI, the Office received petitions to renew each existing exemption, except for one.¹⁹ Each of the thirty-eight renewal petitions received included a summary of the continuing need and justification for the exemption. In each case, petitioners also signed a declaration stating that, to the best of their personal knowledge, there has not been any material change in the facts, law, or other circumstances set forth in the prior rulemaking record such that renewal of the exemption would not be justified.

The Office received eight comments in response to the renewal petitions, two of which support renewal of specific exemptions. Six comments oppose certain different aspects of the renewal petitions.²⁰

As detailed below, after reviewing the petitions for renewal and comments in response, the Office concludes that each petition is sufficient to renew the corresponding existing exemption, and does not find sufficient opposition to any existing exemption that supports refusing renewal. Accordingly, the Office intends to recommend that the thirty-eight existing exemptions for which renewal petitions were received be renewed in their current form.²¹

¹⁹ A renewal petition was not filed for the current exemption permitting circumvention of video games in the form of computer programs for the purpose of allowing an individual with a physical disability to use alternative software or hardware input methods. *See* 37 CFR 201.40(b)(21). The Office therefore will not recommend this exemption to the Librarian for renewal.

²⁰ *See, e.g.*, DVD Copy Control Ass’n (“DVD CCA”) & Advanced Access Content Sys. Licensing Adm’r (“AACSLA”) Noncom. Videos Opp.; DVD CCA & AACSLA AV Educ. TDM Opp.; Author Services, Inc. (“Author Services”) Device Repair Opp.; American Consumer Institute (“ACI”) Medical Device Repair Opp.; Medical Imaging & Technology Alliance (“MITA”) Medical Device Repair Opp.; Philips North America, LLC (“Philips”) Medical Device Repair Opp.

²¹ Because a renewal petition was not filed for the current exemption found within 37 CFR 201.40(b)(21), the Office will not renew or consider this exemption during the rulemaking proceeding. *See Exemptions to Permit Circumvention of Access Controls on Copyrighted Works*, 82 FR 29804, 29805 (June 30, 2017) (“[T]he statutory language appears to be broad enough to permit determinations to be based upon evidence drawn from prior proceedings, but only upon a conclusion that this evidence remains reliable to support granting an exemption in the current proceeding.” (quoting Section 1201 Study at 142–43)); *see also id.* (requiring those seeking renewal to use the Office’s form to summarize the “existence of a continuing need and justification for the exemption” and attest that “there has not been any material change in the facts, law, or other circumstances set forth in the prior rulemaking record . . . that originally

A. Audiovisual Works—Criticism and Comment—Filmmaking

Multiple organizations petition to renew the exemption for motion pictures²² for uses in documentary films or other films where the use is a parody or for a biographical or historically significant nature (codified at 37 CFR 201.40(b)(1)(i)(A)).²³ No oppositions were filed against renewal.

The petitions for renewal summarize the continuing need and justification for the exemption, and the petitioners demonstrate personal knowledge of and experience with this exemption. For example, the International Documentary Association and Kartemquin Educational Films (collectively “Joint Filmmakers”)—which represent thousands of independent filmmakers across the nation—state that TPMs such as encryption continue to prevent filmmakers from accessing needed material, and that this is “especially true for the kind of high fidelity motion picture material filmmakers need to satisfy both distributors and viewers.”²⁴ Petitioners state that filmmakers have found it necessary to rely on this exemption and will continue to do so.²⁵

Based on the information provided in the renewal petitions and the lack of opposition, the Office believes that the conditions that led to adoption of this exemption are likely to continue during the next triennial period. Accordingly, it intends to recommend renewal.

demonstrated the need for the selected exemption, such that renewal of the exemption would not be justified”).

²² Unless otherwise noted, all references to motion pictures as a category include television programs and videos.

²³ International Documentary Association and Kartemquin Educational Films (collectively “Joint Filmmakers”) Documentary Films Renewal Pet.; New Media Rights (“NMR”) Documentary Films Renewal Pet.

²⁴ Joint Filmmakers Documentary Films Renewal Pet. at 3.

²⁵ *Id.*; NMR Documentary Films Renewal Pet. at 3.

B. Audiovisual Works—Criticism and Comment—Noncommercial Videos

Two organizations petition to renew the exemption for motion pictures for use in noncommercial videos (codified at 37 CFR 201.40(b)(1)(i)(B)).²⁶ The petitions argue for the continuing need and justification for the exemption, and the petitioners demonstrate personal knowledge of and experience with this exemption. For example, one of the petitioners, OTW, has advocated for the noncommercial video exemption in past triennial rulemakings, and has heard from “a number of noncommercial remix artists” who have used the exemption in the past and anticipate needing to use it in the future.²⁷ OTW includes an account from an academic stating that footage ripped from DVDs and Blu-ray was preferred for “vidders” (noncommercial remix artists) because “it is high quality enough to bear up under the transformations that vidders make to it—which now routinely include changes of color, speed, cropping and zooming, masking, animations and other cgi, and even explorations of the z-axis and 3D.”²⁸ Similarly, NMR notes “a continuing need for the exemption” and a purported reliance by filmmakers to make these types of uses in the next triennial period.²⁹ No oppositions were filed to renewal of the exemption as currently formulated.

The Office did, however, receive opposition to OTW’s renewal petition to the extent it seeks to modify the regulatory language of this exemption. Specifically, in its renewal petition, OTW proposes the Office “us[e] the relatively simple language defining the exempted class from the 2008 rulemaking,” rather than the language in the current exemption, which was adopted in the 2021 rulemaking.³⁰ DVD CCA and AACSLA

²⁶ NMR Noncom. Videos Renewal Pet.; Organization for Transformative Works (“OTW”) Noncom. Videos Renewal Pet.

²⁷ OTW Noncom. Videos Renewal Pet. at 3.

²⁸ *Id.*

²⁹ NMR Noncom. Videos Renewal Pet. at 3.

³⁰ OTW describes its requested change to the exemption language as “not . . . an expansion of the existing exemption, but a more understandable restatement.” OTW Noncom. Videos Renewal Pet. at 4.

object to the proposed change in the language sought by OTW, noting that the Office’s streamlined proceedings for renewals is “only” for exemptions “as they are currently written in the Code of Federal Regulations, without modification.”³¹ The Office agrees. OTW’s proposed modifications must instead be addressed as part of the full rulemaking proceeding, and therefore this request is included as one of the proposed new classes discussed below.³²

Based on the information provided in the renewal petitions and the lack of opposition to renewal of the exemption as it currently exists, the Office believes that the conditions that led to adoption of this exemption are likely to continue during the next triennial period. Accordingly, it intends to recommend renewal.

C. Audiovisual Works—Criticism and Comment—Multimedia E-Books

Authors Alliance, the American Association of University Professors (“AAUP”), and independent documentary producer and screenwriter, Bobette Buster, filed a joint petition to renew the exemption for the use of motion picture excerpts in nonfiction multimedia e-books (codified at 37 CFR 201.40(b)(1)(i)(C)).³³ No oppositions were filed against renewal.

The petition states that there is a continuing need and justification for the exemption by pointing to Professor Buster’s continuing work on an e-book series titled “Deconstructing Master Filmmakers,” where the “use of high-resolution video is essential” to the project and would not be available “without the circumvention of technological protection measures.”³⁴ The petition notes that Professor Buster’s project

³¹ DVD CCA & AACS LA Noncom. Videos Opp. at 2 (emphasis omitted) (quoting 2023 NOI at 37487).

³² See 2023 NOI at 37487. As the Office previously noted, much of the language that has been added to the exemption since 2008 was sought by exemption proponents. See 2012 Recommendation at 105, 110.

³³ Buster, Authors Alliance & AAUP Nonfiction Multimedia E-Books Renewal Pet.

³⁴ *Id.* at 3.

has been discussed during the three previous rulemakings and its continuation justifies renewal of the current exemption.

The Office agrees. Based on the information provided in the renewal petition and the lack of opposition, the Office believes that the conditions that led to adoption of this exemption are likely to continue during the next triennial period.³⁵ Accordingly, it intends to recommend renewal.

D. Audiovisual Works—Criticism and Comment—Universities and K-12 Educational Institutions

Several organizations petition to renew the exemption for motion pictures for educational purposes by college and university faculty, students, or employees acting at the direction of faculty, or K-12 educators and students (codified at 37 CFR 201.40(b)(1)(ii)(A)).³⁶ No oppositions were filed against renewal.

The petitions argue for the continuing need and justification for the exemption, stating that educators and students continue to rely on excerpts from digital media for class presentations and coursework. Peter Decherney, Michael Delli Carpini, Library Copyright Alliance (“LCA”), and Society for Cinema and Media Studies (“SCMS”) (collectively “Joint Educators”) provide several examples of professors using DVD clips in the classroom. For example, University of Pennsylvania Medieval Literature Professor

³⁵ The Office notes that petitioners have filed highly similar renewal petitions in the 2018 and 2021 rulemaking proceedings, testifying generally that Professor Buster has continued to work on her e-book series without additional specifics about that work or progress. *See* 2018 Bobette Buster et al. Nonfiction Multimedia E-Books Renewal Pet. at 3 (“Ms. Buster continues to work on an e-book series, based on her lecture series, ‘Deconstructing Master Filmmakers: The Uses of Cinematic Enchantment,’ that relies on the availability of high-resolution video not available without circumvention of technological protection measures”); 2021 Bobette Buster et al. Nonfiction Multimedia E-Books Renewal Pet. at 3 (“Ms. Buster continues to work on an e-book series, based on her lecture series, ‘Deconstructing Master Filmmakers: The Uses of Cinematic Enchantment,’ that relies on the availability of high-resolution video not available without circumvention of technological protection measures.”). If petitioners seek renewal in future proceedings, the Office suggests that they provide additional information about Professor Buster’s progress or point to other individuals relying on the exemption.

³⁶ Decherney, Delli Carpini, Library Copyright Alliance (“LCA”), and Society for Cinema and Media Studies (“SCMS”) (collectively “Joint Educators”) AV Educ. Renewal Pet.; Brigham Young Univ.—Idaho Intellectual Property Office (“BYU-Idaho”) AV Educ. Renewal Pet.

David Wallace “frequently uses film and television clips to compare medieval poetry with the style of popular contemporary film” and “uses the clips to focus on historical detail.”³⁷ In addition, co-petitioner Peter Decherney declares that he “continues to rely heavily on this exemption in teaching his course on Multimedia Criticism” where his students “produce short videos analyzing media.”³⁸ Indeed, Joint Educators broadly suggest that the “entire field” of video essays or multimedia criticism “could not have existed in the United States without fair use and the 1201 educational exemption.”³⁹ Similarly, BYU-Idaho assert that access to films on streaming platforms “are not available for institutions due to limited licensing agreements that limit uses to residential or personal use.”⁴⁰ Through these submissions, petitioners demonstrate personal knowledge of and experience with regard to this exemption based on their representation of thousands of digital and literacy educators and/or members supporting educators and students, combined with past participation in the section 1201 triennial rulemaking.

Based on the information provided in the renewal petitions and the lack of opposition, the Office believes that the conditions that led to adoption of this exemption are likely to continue during the next triennial period. Accordingly, it intends to recommend renewal.

E. Audiovisual Works—Criticism and Comment—Massive Open Online Courses (“MOOCs”)

Peter Decherney, Michael Delli Carpini, LCA, and SCMS (collectively “Joint Educators”) jointly petition to renew the exemption for motion pictures for educational uses in MOOCs (codified at 37 CFR 201.40(b)(1)(ii)(B)).⁴¹ No oppositions were filed against renewal.

³⁷ Joint Educators AV Educ. Renewal Pet. at 3.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ BYU-Idaho AV Educ. Renewal Pet. at 3.

⁴¹ Joint Educators AV Educ. MOOCs Renewal Pet.

The petition cites a continuing need and justification for the exemption, stating that instructors continue to rely on the exemption to “develop, provide, and improve MOOCs,” as well as increase the number of (and therefore access to) MOOCs, particularly in the field of film and media studies.⁴² Specifically, Joint Educators note that Professor Decherney’s History of Hollywood class “offers close readings of Hollywood classics like King Kong (1933) and Casablanca (1942) and analyzes digital special effects, sound design, and other elements of filmmaking.”⁴³ The petition also states that the “exemption has become even more vital since the COVID-19 pandemic and the continuing shift of our education systems to include online learning,” highlighting the increase in MOOCs and increased enrollment.⁴⁴

Based on the information provided in the renewal petition and the lack of opposition, the Office believes that the conditions that led to adoption of this exemption are likely to continue during the next triennial period. Accordingly, it intends to recommend renewal.

F. Audiovisual Works—Criticism and Comment—Digital and Media Literacy Programs

LCA and Professor Renee Hobbs petition to renew the exemption for motion pictures for educational uses in nonprofit digital and media literacy programs offered by libraries, museums, and other nonprofits (codified at 37 CFR 201.40(b)(1)(ii)(C)).⁴⁵ No oppositions were filed against renewal.

The petition provides testimony as to the continuing need and justification for the exemption, and petitioners demonstrate personal knowledge of and experience with this exemption. For example, the petition states that librarians, museums, and other nonprofit

⁴² *Id.* at 3.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ LCA & Hobbs AV Educ. Nonprofits Renewal Pet.

entities across the country have relied on the current exemption and will continue to do so for their digital and media literacy programs.⁴⁶ The petition also notes that Professor Hobbs has testified in several previous rulemakings and has personal experience with the relevant standards and evidence underpinning the current exemption.

Based on the information provided in the renewal petition and the lack of opposition, the Office believes that the conditions that led to adoption of this exemption are likely to continue during the next triennial period. Accordingly, it intends to recommend renewal.

G. Audiovisual Works—Captioning and Audio Description

The Association of Transcribers and Speech-to-Text Providers (“ATSP”) and LCA jointly petition to renew the exemption for motion pictures for the provision of captioning and/or audio description by disability services offices or similar units at educational institutions for students, faculty, or staff with disabilities (codified at 37 CFR 201.40(b)(2)).⁴⁷ No oppositions were filed against renewal.

The petition contains testimony that the exemption continues to be relied on by its beneficiaries. For example, petitioners assert that they “have used the exemption to address the requests and concerns of students with disabilities in attendance at their respective educational institutions to create equitable educational experiences,” which “enables disability services offices and similar units to ensure that students with disabilities have access to the same advantages as their peers in the pursuit of education.”⁴⁸ “Based on their regular interaction with those affected by the exemption,” which demonstrates personal knowledge of the exemption, petitioners believe that the

⁴⁶ *Id.* at 3.

⁴⁷ ATSP & LCA Captioning Renewal Pet.

⁴⁸ *Id.* at 3.

circumstances justifying the exemption currently exist and will persist for the next three years.⁴⁹

Based on the information provided in the renewal petition and the lack of opposition, the Office believes that the conditions that led to adoption of this exemption are likely to continue during the next triennial period. Accordingly, it intends to recommend renewal.

H. Audiovisual Works—Preservation or Replacement—Library, Archives, and Museum

LCA petitions to renew the exemption for motion pictures for preservation or the creation of a replacement copy by an eligible library, archives, or museum (codified at 37 CFR 201.40(b)(3)).⁵⁰ No oppositions were filed against renewal.

The petition provides testimony as to the continuing need and justification for the exemption. For example, the petition states that “[c]ultural heritage institutions across the country have relied on the exemption . . . to make preservation and replacement copies of the motion pictures in their collections stored on DVDs and Blu-ray discs,” as many motion pictures in the collections “are unavailable for purchase or streaming” or “continue to deteriorate.”⁵¹ LCA also demonstrates personal knowledge of the exemption based on its past participation with this particular exemption in the previous section 1201 triennial rulemaking.

Based on the information provided in the renewal petition and the lack of opposition, the Office believes that the conditions that led to adoption of this exemption are likely to continue during the next triennial period. Accordingly, it intends to recommend renewal.

⁴⁹ *Id.*

⁵⁰ LCA Preservation Renewal Pet.

⁵¹ *Id.* at 3.

I. Audiovisual Works—Text and Data Mining—Scholarly Research and Teaching

Authors Alliance, AAUP, and LCA jointly petition to renew the exemption for text and data mining of motion pictures by researchers affiliated with a nonprofit institution of higher education, or at the direction of such researchers, for the purpose of scholarly research and teaching (codified at 37 CFR 201.40(b)(4)).⁵² As discussed further below, DVD CCA & AACCS LA submitted a comment in opposition.

The petition argues that there is a continuing need for the exemption and includes examples of researchers actively relying on the exemption. For example, as part of “researching depictions” of climate changes, Professor James Lee at the University of Cincinnati, is using the exemption “to build a corpus of . . . films to then conduct text and data mining, searching for climate change markers across those materials.”⁵³ According to the petition, there is a continued need for the exemption because “this type of research requires substantial computing resources and institutional coordination” and, as a result, “many of these projects are just now taking shape” as “a wide range of researchers . . . are actively planning projects that would rely on the TDM exemption.”⁵⁴ The petition further states that the Office can rely on the record from the previous rulemaking because the relevant case law has not changed and there have been no developments in the market that would allow petitioners to obtain the works they need without circumvention.⁵⁵ Finally, the petition states that “[c]ommercially licensed text and data mining products continue to be made available to research institutions, as they were at the time of the

⁵² Authors Alliance, AAUP & LCA AV Text and Data Mining Renewal Pet.

⁵³ *Id.* at 3. Additionally, the petition described how John Bell, Director of the Data Experiences and Visualizations Studio and Digital Humanities Program Manager at Dartmouth Research Computing, uses the exemption in his “Deep Screens XR Project,” which “extracts video files from 800+ DVDs of commercial narrative films, stores those videos in a secure compute environment, and processes them using machine learning-based methods to establish 3D body pose data on the actors in those films.” *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* at 4

2021 exemption and as is reflected in the existing record, but these licensed products do not allow researchers to license the full array of texts and films that are needed to engage in the research they seek to do.”⁵⁶

DVD CCA and AACS LA filed an objection to renewal on the grounds that the previous rulemaking record is no longer reliable. According to DVD CCA and AACS LA, during the last rulemaking petitioners “contended that there was no evidence of the availability of licenses for motion pictures for their desired use” and the Office’s recommendation of the exemption was based on the fact that “there [were] no [existing] large-scale libraries of digital motion pictures available for text and data mining.”⁵⁷ DVD CCA and AACS LA argue that “because proponents’ own petition indicates they are aware of the emergence of licensed access to motion pictures for data mining purposes, then such facts should be developed in the full rulemaking as such licensing opportunities could be a reasonable alternative to circumvention.”⁵⁸ DVD CCA and AACS LA did not, however, provide affirmative evidence of new licensing options for the text and data mining activities covered by the current exemption.

After reviewing the renewal petition, the opposition comment, and the record from the previous rulemaking for this exemption, the Office concludes that the exemption may be renewed by relying on the prior record. DVD CCA and AACS LA are correct that the Register concluded in 2021 that “there are no existing large-scale libraries of digital motion pictures available for text and data mining.”⁵⁹ Contrary to the opposition’s assertion, however, the Register did not find that licensed text and data mining products were “nonexistent.”⁶⁰ Opponents of the exemption, including from DVD

⁵⁶ *Id.*

⁵⁷ DVD CCA & AACS LA AV Text and Data Mining Opp. at 2, 3 n.1 (quoting 2021 Recommendation at 119).

⁵⁸ *Id.* at 3.

⁵⁹ 2021 Recommendation at 119.

⁶⁰ DVD CCA & AACS LA AV Text and Data Mining Opp. at 2.

CCA and AACS LA, asserted in the previous rulemaking that “[i]n fact, licenses are available” for text and data mining.⁶¹ For example, the Motion Picture Association, Alliance for Recorded Music, and Entertainment Software Association, filed a joint submission arguing that an exemption was unnecessary because “copyright owners of motion pictures already license other educational uses, such as remote streaming, and could potentially license the uses at issue.”⁶² Ultimately, the Office concluded that while there may have been a “nascent, but growing” market for licenses,⁶³ proponents were unable to obtain the “large-scale” licenses they claimed were needed for the quantity of audiovisual works necessary to engage in text and data mining.⁶⁴ The statement in the current renewal petition that “licensed products do not allow researchers to license the full array of texts and films that are needed to engage in the research they seek to do”⁶⁵ is thus a summary of the previous rulemaking record; not an admission that the relevant facts have changed. For this reason, the opposition filed by DVD CCA and AACS LA does not preclude renewal of this exemption.⁶⁶

⁶¹ 2021 DVD CCA & AACS LA Class 7 Opp. at 14–15 (pointing to testimony by Professor Lauren Tilton as “suggesting research groups need financial resources to license [] works” for text and data mining but as “not say[ing] that licenses are not available, that rightsholders are unwilling to license the works, or even that the fees for such licenses are unreasonable”).

⁶² 2021 Joint Creators Class 7 Opp. at 6.

⁶³ 2021 Recommendation at 112–13 (quoting 2021 Ass’n of American Publishers Class 7 Opp. at 9–10).

⁶⁴ *See id.* at 119 (“For researchers interested in studying motion pictures, there are no existing large-scale libraries of digital motion pictures available for text and data mining.”); *see also* 2021 Hearing Tr. at 415:22–416:07 (Apr. 7, 2021) (Professor David Bamman, University of California, Berkeley) (stating that “licensing for movies” was a problem for text and data mining because such activities could not be “carr[ied] out if there’s any single studio that doesn’t allow the licenses for those terms”).

⁶⁵ Authors Alliance, AAUP & LCA AV Text and Data Mining Renewal Pet. at 4.

⁶⁶ The Office also notes that the opposition did not provide affirmative evidence of “new legal or factual developments that implicate ‘the reliability of the previously-analyzed administrative record,’” as required by the Notice of Inquiry. 2023 NOI at 37488 (quoting *Exemptions to Permit Circumvention of Access Controls on Copyrighted Works*, 85 FR 65293, 65295 (Oct. 15, 2020)). As the Office explained in June, “[u]nsupported conclusory opinion and speculation” will “not be enough” for the Office “to refuse to recommend renewing an exemption it would have otherwise recommended in the absence of any opposition.” *Id.* It is not enough to point to a single sentence offered by renewal petitioners arguing that the record remains unchanged.

Based on the information provided in the renewal petition and the lack of sufficient opposition, the Office believes that the conditions that led to adoption of this exemption are likely to continue during the next triennial period. Accordingly, it intends to recommend renewal.

J. Literary Works—Text and Data Mining—Scholarly Research and Teaching

Authors Alliance, AAUP, and LCA also jointly petition to renew the exemption for text and data mining of literary works that were distributed electronically by researchers affiliated with a nonprofit institution of higher education, or at the direction of such researchers, for the purpose of scholarly research and teaching (codified at 37 CFR 201.40(b)(5)).⁶⁷ No oppositions were filed against renewal.

The petition largely echoes the same petitioners' joint petition for text and data mining of audiovisual works. Petitioners state that they "have continued to work with researchers, . . . many of whom are now actively relying on the TDM exemption in their research or developing plans to do so in the very near future."⁶⁸ For example, they point to Professor Lee's use of the exemption to research depictions of climate change, where he "build[s] a corpus of novels . . . to then conduct text and data mining, searching for climate change markers across those materials."⁶⁹ Because researchers are actively relying on the current exemption, and because "there are no material changes in facts, law, technology, or other circumstances" from the previous rulemaking, petitioners seek to renew the exemption in this cycle.⁷⁰

Based on the information provided in the renewal petition and the lack of opposition, the Office believes that the conditions that led to adoption of this exemption

⁶⁷ Authors Alliance, AAUP & LCA LW Text and Data Mining Renewal Pet.

⁶⁸ *Id.* at 3.

⁶⁹ *Id.*

⁷⁰ *Id.* at 4.

are likely to continue during the next triennial period. Accordingly, it intends to recommend renewal.

K. Literary Works—Assistive Technologies

The American Council of the Blind (“ACB”), American Foundation for the Blind (“AFB”), HathiTrust, and LCA jointly petition to renew the exemption for literary works or previously published musical works that have been fixed in the form of text or notation, distributed electronically, whose technological measures interfere with assistive technologies (codified at 37 CFR 201.40(b)(6)).⁷¹ No oppositions were filed against renewal.

The petition provides evidence regarding the continuing need and justification for the exemption stating that individuals who are blind, visually impaired, or print disabled are significantly disadvantaged with respect to obtaining accessible e-book content because TPMs interfere with the use of assistive technologies.⁷² Specifically, petitioners assert that “many e-books have built-in security software that prevents purchasers and other third parties from utilizing them outside of publisher-designated e-book reader platforms.”⁷³ Petitioners also note that the record underpinning the exemption “has stood and been re-established in the past seven triennial reviews dating back to 2003” and that the “accessibility of e-books is frequently cited as a top priority” by its members.⁷⁴ Finally, they demonstrate personal knowledge of and experience with the assistive technology exemption, as organizations that have participated in past rulemaking proceedings regarding this exemption and advocate for individuals with print disabilities.

Based on the information provided in the renewal petition and the lack of opposition, the Office believes that the conditions that led to adoption of this exemption

⁷¹ ACB, AFB, HathiTrust & LCA Assistive Technologies Renewal Pet.

⁷² *Id.* at 3.

⁷³ *Id.*

⁷⁴ *Id.* at 3, 4.

are likely to continue during the next triennial period. Accordingly, it intends to recommend renewal.

L. Literary Works—Medical Device Data

The Coalition of Medical Device Patients and Researchers petition to renew the exemption covering access to patient data on medical devices or monitoring systems (codified at 37 CFR 201.40(b)(7)).⁷⁵ No oppositions were filed against renewal.

The petition states that patients continue to need access to data output from their medical devices to manage their health and react to their medical data in real-time, which the current exemption facilitates.⁷⁶ One member of the Coalition, who has personal knowledge of and experience with this exemption through participation in past rulemakings, attests that he needed access to the data output from his medical device.⁷⁷ Another member describes how an inability to get her defibrillator interrogated by an authorized representative within a three-day window “potentially put[] her health at serious risk.”⁷⁸

Based on the information provided in the renewal petition and the lack of opposition, the Office believes that the conditions that led to adoption of this exemption are likely to continue during the next triennial period. Accordingly, it intends to recommend renewal.

M. Computer Programs—Unlocking

The Institute of Scrap Recycling Industries, Inc. (“ISRI”) petitions to renew the exemption for computer programs that operate wireless devices, to allow connection of

⁷⁵ Coalition of Medical Device Patients and Researchers Medical Devices Renewal Pet.

⁷⁶ *Id.* at 3, 4.

⁷⁷ *Id.* at 3.

⁷⁸ *Id.*

the device to an alternative wireless network (“unlocking”) (codified at 37 CFR 201.40(b)(8)).⁷⁹ No oppositions were filed against renewal.

The petition offers evidence of the continuing need and justification for the exemption by explaining that ISRI’s members continue to receive wireless products that are locked to a particular wireless carrier.⁸⁰ Moreover, ISRI notes that the number of 5G-enabled devices has continued to grow since the previous rulemaking, meaning that there are more devices that may require unlocking for the reasons discussed in previous rulemakings.⁸¹ For example, ISRI states that its members continue to purchase or acquire donated cell phones, tablets, and other wireless devices and try to reuse them, but that wireless carriers still lock devices to prevent them from being used on other carriers.⁸² ISRI has personal knowledge of and experience with this exemption because it represents companies that rely on the ability to unlock cellphones and has participated in “several cycles” of triennial rulemakings addressing device unlocking.⁸³

Based on the information provided in the renewal petition and the lack of opposition, the Office believes that the conditions that led to adoption of this exemption are likely to continue during the next triennial period. Accordingly, it intends to recommend renewal.

⁷⁹ ISRI Unlocking Renewal Pet.

⁸⁰ *Id.* at 3.

⁸¹ *Id.* The petition also notes that the increased number of devices does not implicate the reliability of the factual record, as new devices continue to use modems by a single chipset vendor—Qualcomm—which was the basis for the Office’s expansion of this exemption to all wireless devices in the last rulemaking. *See* 2021 Recommendation at 161–63 (explaining that “proponents have provided sufficient evidence for the Register to conclude that the 2015 fair use analysis applies with equal force to unlocking all types of wireless devices” because most wireless devices in the United States use modems manufactured by Qualcomm).

⁸² ISRI Unlocking Renewal Pet. at 3.

⁸³ *Id.*

N. Computer programs—Jailbreaking

The Office received multiple petitions to renew the four exemptions that permit enabling electronic devices to interoperate with or to remove software applications (“jailbreaking”) (codified at 37 CFR 201.40(b)(9)–(12)).⁸⁴ No oppositions were filed against renewal.

The renewal petitions provide evidence of the continuing need and justification for the four jailbreaking exemptions. Regarding smartphones and other portable all-purpose mobile computing devices specifically, EFF asserts that they “spoke to many device users who currently rely on the jailbreaking exemption and anticipate continuing to rely on the exemption in the future” for uses such as installing an alternative operating system, keeping older devices functional, and customizing application functionality.⁸⁵ For smart TVs, SFC asserts that “the majority of Smart TV platforms ship to the consumer in ‘locked’ formats, which prevent users from loading third-party software to enable interoperability.”⁸⁶ For voice assistant devices, EFF points to voice assistant devices, such as the Lenovo smart display, that are no longer supported but whose users wish to expand their functionality and install updated software.⁸⁷ And for routers, SFC states that based on its observations, there is a continued need to install alternative firmware and security updates to networking devices.⁸⁸

⁸⁴ These exemptions permit circumvention for the purpose of jailbreaking (1) smartphones and other portable all-purpose computing devices, (2) smart televisions, (3) voice assistant devices, and (4) routers and dedicated networking devices. *See* Electronic Frontier Foundation (“EFF”) Smartphone and Portable All-Purpose Mobile Computing Device Jailbreaking Renewal Pet.; NMR Smartphone and Portable All-Purpose Mobile Computing Device Jailbreaking Renewal Pet.; EFF Smart TVs Jailbreaking Renewal Pet.; Software Freedom Conservancy (“SFC”) Smart TVs Jailbreaking Renewal Pet.; EFF Voice Assistant Devices Jailbreaking Renewal Pet.; SFC Routers and Dedicated Network Devices Jailbreaking Renewal Pet.

⁸⁵ EFF Smartphone and Portable All-Purpose Mobile Computing Device Jailbreaking Renewal Pet. at 3.

⁸⁶ SFC Smart TVs Jailbreaking Renewal Pet. at 3.

⁸⁷ EFF Voice Assistant Devices Jailbreaking Renewal Pet. at 3.

⁸⁸ SFC Routers and Dedicated Network Devices Jailbreaking Renewal Pet. at 3.

Based on the information provided in the renewal petitions and the lack of opposition, the Office believes that the conditions that led to adoption of these exemptions are likely to continue during the next triennial period. Accordingly, it intends to recommend renewal.

O. Computer Programs—Repair of Motorized Land Vehicles, Marine Vessels, or Mechanized Agricultural Vehicles or Vessels

Both iFixit and MEMA, The Vehicle Suppliers Association (“MEMA”) filed petitions to renew the exemption for computer programs that control motorized land vehicles, marine vessels, or mechanized agricultural vehicles or vessels for purposes of diagnosis, repair, or modification of the vehicle or vessel function (codified at 37 CFR 201.40(b)(13)).⁸⁹ No oppositions were filed against renewal.

Both petitions attest that the current exemption remains necessary. For example, MEMA states that “seemingly every year vehicle computer programs become more important and essential to today’s motor vehicles” and that its membership “continues to see firsthand that the exemption is helping protect consumer choice and a competitive market, while mitigating risks to intellectual property and vehicle safety.”⁹⁰ iFixit states “the software measures manufacturers deploy for the purpose of controlling access to vehicle software . . . prevent[s] consumers and independent repair shops from lawfully diagnosing, maintaining, repairing, and upgrading their vehicles.”⁹¹ Both petitioners have personal knowledge of and experience with this exemption; both have participated in previous rulemakings and either represent or have gathered information from individuals or professionals conducting repairs or businesses that manufacture, distribute, and sell motor vehicle parts.

⁸⁹ iFixit Vehicle or Vessel Repair Renewal Pet.; MEMA Vehicle or Vessel Repair Renewal Pet.

⁹⁰ MEMA Vehicle or Vessel Repair Renewal Pet. at 3.

⁹¹ iFixit Vehicle or Vessel Repair Renewal Pet. at 3.

Based on the information provided in the renewal petitions and the lack of opposition, the Office believes that the conditions that led to adoption of this exemption are likely to continue during the next triennial period. Accordingly, it intends to recommend renewal.

P. Computer Programs—Repair of Devices Designed Primarily for Use by Consumers

EFF petitions to renew the exemption for computer programs that control devices designed primarily for use by consumers for diagnosis, maintenance, or repair of the device (codified at 37 CFR 201.40(b)(14)).⁹² The Office received one opposition from Author Services, discussed further below.

The petition asserts a for the continuing need and justification for the exemption, stating that “[m]anufacturers of these devices continue to implement technological protection measures that inhibit lawful repairs, maintenance, and diagnostics, and they show no sign of changing course.”⁹³ The petition also reports that the Federal Trade Commission has identified “‘unjustified software locks, digital rights management, and technological protection measures’ as one form of anticompetitive repair restriction,” and that the few state laws pertaining to the right to repair “have important gaps,” such as not encompassing certain devices covered by the current exemption.⁹⁴ EFF has personal knowledge of and experience with this exemption due to its prior advocacy for the exemption in past proceedings.

Author Services, an organization that represents the works of L. Ron Hubbard, filed an opposition to renewal of this exemption “in its present form.”⁹⁵ While Author

⁹² EFF Device Repair Renewal Pet.

⁹³ *Id.* at 3.

⁹⁴ *Id.* (quoting Federal Trade Commission, Policy Statement of the Federal Trade Commission on Repair Restrictions Imposed by Manufacturers and Sellers 1 (2021), <https://www.ftc.gov/legal-library/browse/policy-statement-federal-trade-commission-repair-restrictions-imposed-manufacturers-sellers>).

⁹⁵ Author Services Device Repair Opp. at 1.

Services states that it has “no objection” with consumers repairing products sold “in the open market to ordinary consumers,” it objects to the extent that the exemption may encompass devices that “can only be purchased and used by someone who possess[es] particular qualifications or has been specifically trained in the use of the device.”⁹⁶

Author Services asserts that the Office did not consider these types of devices when granting the exemption in the previous proceeding, and contends that applying the exemption to such devices undermines manufacturers’ abilities to control their software and “directly contradict[s]” negotiated licenses.⁹⁷

After reviewing the renewal petition, the opposition comment, and the record from the previous rulemaking, the Office concludes that the exemption may be renewed by relying on the prior record. Author Services’ opposition is limited to devices available “only” to individuals with qualifications and training, and they therefore would not qualify as “primarily designed for use by consumers” within the scope of the existing exemption.⁹⁸ This exemption was crafted to cover consumer devices because proponents in the previous rulemaking had shown “common characteristics such that users of the proposed exemption are likely to be similarly situated.”⁹⁹ In its prior rulemaking, the Office declined to recommend an exemption covering commercial and industrial devices because it was “unclear” from the record whether they shared the same common traits.¹⁰⁰ The devices described by Author Services appear to fall into the latter category, and therefore the opposition does not show that the previous rulemaking record is no longer reliable.

⁹⁶ *Id.* at 1–2.

⁹⁷ *Id.* at 2.

⁹⁸ 37 CFR 201.40(b)(14) (limiting the exemption to “a lawfully acquired device that is primarily designed for use by consumers”).

⁹⁹ 2021 Recommendation at 197.

¹⁰⁰ *Id.*

Based on the information provided in the renewal petition and the lack of opposition to renewal, the Office believes that the conditions that led to adoption of this exemption are likely to continue during the next triennial period. Accordingly, it intends to recommend renewal.

Q. Computer Programs—Repair of Medical Devices and Systems

Five organizations filed petitions to renew the exemption to access computer programs that are contained in and control the functioning of medical devices or systems, and related data files, for diagnosis, maintenance, or repair (codified at 37 CFR 201.40(b)(15)).¹⁰¹ The Office received three comments opposing renewal, discussed further below.

Four of the petitions provide evidence of the continuing need and justification for the exemption.¹⁰² For example, Avante states that “the use of TPMs in medical systems and devices is widespread among the types of systems and devices” and that manufacturers “have developed new systems that further restrict access to use of necessary software tools.”¹⁰³ TTG Imaging Solutions asserts that the exemption is “crucial to ensure the availability, affordability, and timely repair of medical devices,

¹⁰¹ See Avante Health Solutions, Avante Diagnostic Imaging, Avante Ultrasound (collectively “Avante”) Medical Device Repair Renewal Pet.; Crothall Facilities Management, Inc. (“Crothall”) Medical Device Repair Renewal Pet.; Metropolis Int’l Medical Device Repair Renewal Pet.; TriMedx Holdings, LLC (“TriMedx”) Medical Device Repair Renewal Pet.; TTG Imaging Solutions, LLC (“TTG Imaging Solutions”) Medical Device Repair Renewal Pet.

¹⁰² A fifth petition, submitted by Crothall, did not meet the Office’s requirements for renewal petitions. While the Office requires “a brief explanation summarizing the basis for claiming a continuing need and justification for the exemption,” 2023 NOI at 37488, Crothall’s petition contains only two brief sentences stating that its ability to service medical devices “can be impacted” by software restrictions. See Crothall Medical Device Repair Renewal Pet. at 3 (“Crothall’s ability to service a device without using the installed software and data files can be impacted by software access. Access to software error logs is a critical function in the optimal diagnosis, maintenance, and repair of devices.”). Because other petitioners provide the required information for renewal, Crothall’s petition is not discussed further.

¹⁰³ Avante Medical Device Repair Renewal Pet. at 3. Avante proposed this exemption in the previous rulemaking and was referred to as “Transtate” in the Register’s Recommendation. See 2021 Register’s Recommendation at 190.

which directly impacts patient care and healthcare accessibility.”¹⁰⁴ And both Metropolis International and TriMedx testify that they relied on the current exemption to refurbish and repair medical systems.¹⁰⁵ The petitioners have personal knowledge of and experience with this exemption; each either repairs, maintains, services, or sells medical systems and devices for entities in the healthcare industry.

The Office received opposition comments from the nonprofit American Consumer Institute (“ACI”), the Medical Imaging & Technology Alliance (“MITA”),¹⁰⁶ and Philips North America, LLC (“Philips”).¹⁰⁷ Opponents assert that the repair exemption “undermines the maintenance and repair standards laid out by the U.S. Food Drug Administration (FDA) for the equipment employed in patient care” because independent servicers conducting repairs are “neither regulated nor monitored” by the FDA.¹⁰⁸ MITA further asserts that “Congress and the FDA have announced new policies on medical device cybersecurity that directly conflict with the 2021 Exemption.”¹⁰⁹ In addition, MITA and Philips both argue that the Supreme Court’s recent decision in *Andy Warhol Found. for the Visual Arts v. Goldsmith (Warhol)*¹¹⁰ constitutes a new legal

¹⁰⁴ TTG Imaging Solutions Medical Device Repair Renewal Pet. at 3.

¹⁰⁵ See Metropolis Int’l Medical Device Repair Renewal Pet. at 3 (testifying that it is a dealer of refurbished medical imaging systems and has faced legal threats for its repair activities); TriMedx Medical Device Repair Renewal Pet. at 3 (testifying that the current exemption “allows TRIMEDX and other third-party servicers to overcome, and in some cases, avoid the anti-competitive tactics of the [original equipment manufacturers], while ensuring third-party service organizations have the necessary access to medical devices and information to repair and maintain the equipment on behalf of hospital customers”).

¹⁰⁶ MITA is currently challenging the original adoption of exemption for medical devices and systems repair. See *MITA v. Library of Congress*, 2023 WL 2387760 (D.D.C. Mar. 7, 2023). The district court granted summary judgment in favor of the Library of Congress, and the case is now on appeal before the D.C. Circuit.

¹⁰⁷ ACI Medical Device Repair Opp.; MITA Medical Device Repair Opp.; Philips Medical Device Repair Opp.

¹⁰⁸ ACI Medical Device Repair Opp. at 1–2.

¹⁰⁹ MITA Medical Device Repair. Opp. at 6 (citing U.S. Food & Drug Admin., Cybersecurity in Medical Devices: Quality System Considerations and Content of Premarket Submissions (Sept. 2023), <https://www.fda.gov/media/119933/download>; Consolidated Appropriations Act, 2023, sec. 3305, 136 Stat. 4459, 5832–34).

¹¹⁰ 143 S. Ct. 1258 (2023).

development that undermines the validity of the previous rulemaking’s analysis due to the Court’s holding that commercial, non-transformative uses are, in general, less likely to qualify as fair.¹¹¹ As applied to medical device repair, MITA and Philips contend that because the repair services at issue can be and are commercialized, with petitioners and others similarly situated profiting from the use of manufacturers’ software to repair devices, this weighs against fair use.¹¹² We address each of these arguments below.

Opponents’ arguments concerning FDA regulation of medical devices were raised and addressed in the last rulemaking, and therefore are not evidence that the factual or legal situation justifying the exemption has changed.¹¹³ During the last rulemaking, the FDA submitted comments in which the agency expressed no objection to the proposed exemption to allow circumvention of TPMs on medical devices for repair-related purposes.¹¹⁴ In its comments, the FDA pointed to its 2018 report on independent medical device repair in which it “concluded that the continued availability of ISOs to service and repair medical devices is critical to the functioning of the healthcare system in the United States.”¹¹⁵ Similarly, the FDA indicated that it “does not share [opponents’] view that an exemption from liability under 17 U.S.C. 1201 for circumvention conducted solely for

¹¹¹ MITA Medical Device Repair Opp. at 2–6; Philips Medical Device Repair Opp. at 5–8.

¹¹² MITA Medical Device Repair Opp. at 5–6; Philips Medical Device Repair Opp. at 6–8; *Warhol*, 143 S. Ct. at 1275 (explaining that while “the commercial nature of the use is not dispositive,” “it is relevant” and “is to be weighed against the degree to which the use has a further purpose or different character”).

¹¹³ See 2021 Recommendation at 228–29 (noting that opponents argued “that the potential consequences of unauthorized circumvention on patient safety should factor into if not decisively tilt the analysis against an exemption” and concluding that those concerns “while significant, do not provide a basis for denying the requested exemption”).

¹¹⁴ See *id.* at 229 (citing Letter from Suzanne B. Schwartz, Dir., Office of Strategic P’ships & Tech. Innovation, FDA, to Kevin R. Amer, Acting Gen. Counsel & Assoc. Register of Copyrights, U.S. Copyright Office (Aug. 13, 2021)).

¹¹⁵ Letter from Suzanne B. Schwartz, Dir., Office of Strategic P’ships & Tech. Innovation, FDA, to Kevin R. Amer, Acting Gen. Counsel & Assoc. Register of Copyrights, U.S. Copyright Office at 3 (Aug. 13, 2021) (citing U.S. Food & Drug Admin., FDA Report on the Quality, Safety, and Effectiveness of Servicing of Medical Devices 23 (May 2018), <https://www.fda.gov/media/113431/download>).

the purpose of diagnosis, maintenance, or repair of medical devices would necessarily and materially jeopardize the safety and effectiveness of medical devices in the United States with respect to cybersecurity.”¹¹⁶ Although the FDA indicated that it was “evaluating [its] approach to cybersecurity and medical device servicing” and, as MITA points out, has since issued updated cybersecurity guidance, and although Congress has imposed additional cybersecurity requirements on medical device manufacturers, these developments do not change the Office’s 1201 analysis.

The Office addressed these same concerns in the last rulemaking, stating that “the Register generally does not consider other regulatory schemes as part of the adverse effects analysis because the focus of this proceeding is on copyright-related considerations.”¹¹⁷ Further, a user availing themselves of the temporary exemption for medical device repair is not absolved from noncompliance with other laws and regulations, including any promulgated by the FDA. Accordingly, the Office concludes that opponents’ renewed safety and cybersecurity arguments do not demonstrate that the relevant legal or factual circumstances justifying the exemption have changed.

As to the argument that the decision in *Warhol* constitutes a change in the law that supports refusal of the renewal petition, MITA and Philips point to the Court’s analysis of the first fair use factor, in which it explained that the “central” question is “whether and to what extent the use at issue has a purpose or character different from the original.”¹¹⁸ They argue that medical device repair is not transformative under the first

¹¹⁶ Letter from Suzanne B. Schwartz, Dir., Office of Strategic P’ships & Tech. Innovation, FDA, to Kevin R. Amer, Acting Gen. Counsel & Assoc. Register of Copyrights, U.S. Copyright Office at 3 (Aug. 13, 2021) (citing U.S. Food & Drug Admin., *Cybersecurity in Medical Devices: Challenges and Opportunities* (June 2021), <https://www.fda.gov/media/150144/download>).

¹¹⁷ See 2021 Recommendation at 229; see also *id.* at 228–29 (noting that opponents argued “that the potential consequences of unauthorized circumvention on patient safety should factor into if not decisively tilt the analysis against an exemption” and concluding that those concerns “while significant, do not provide a basis for denying the requested exemption”).

¹¹⁸ MITA Medical Device Repair Opp. at 3–4 (quoting *Warhol*, 143 S. Ct. at 1274–75); see also Philips Medical Device Repair Opp. at 5–6 (quoting *Warhol*, 143 S. Ct. at 1273, where the Court

factor because the device’s software is “not transformed—at all—during or after the maintenance or repair work” and thus has the “the exact same purpose—to enable the device to function.”¹¹⁹

These fair use arguments assert are largely identical to those raised by opponents, including MITA and Philips, in the prior rulemaking.¹²⁰ They were rejected in the 2021 Register’s Recommendation, which found that “opponents overstate the significance of the commercial purpose element to the fair use analysis” and that repair of medical devices and equipment, like other forms of repair, was likely transformative under the first fair use factor.¹²¹ The Recommendation explained that repair “supports—rather than displaces— the purpose of the embedded programs that control the device.”¹²² In other words, the purpose of the use of software in repair is to render a non-functional device functional again, while the original purpose of the software is to operate a device that functions as designed. Because this analysis is part of the record that justified recommending the exemption in 2021, opponents must show that the decision in *Warhol* constitutes intervening legal precedent that renders the Office’s prior fair use analysis no longer valid.

held the first fair use factor focuses on “whether an allegedly infringing use has a further purpose or different character, which is a matter of degree, and the degree of difference must be weighed against other considerations, like commercialism”).

¹¹⁹ MITA Medical Device Repair Opp. at 4 (emphasis omitted).

¹²⁰ In the 2021 rulemaking, MITA argued there was “nothing transformative about an unregulated [Independent Service Organization] accessing and copying medical imaging device software and materials for a commercial purpose” (2021 MITA Class 12 Opp. at 9), and Philips argued that repair of medical devices and equipment was not fair use because it is “commercial—and thus, presumptively unfair” and because repair does “not transform the copyrighted material,” such as by modifying the software contained in medical devices and systems (2021 Philips Class 12 Opp. at 8).

¹²¹ See 2021 Recommendation at 208–09 (citing 2015 Recommendation at 234–35 (concluding that repair of vehicles was likely to be transformative because “proposed uses for diagnosis and repair would presumably enhance the intended use of [the embedded] computer programs”)).

¹²² *Id.* at 201 (quoting U.S. Copyright Office, Software-Enabled Consumer Products 40 (2016), <https://www.copyright.gov/policy/software/software-full-report.pdf>). And the Office’s previous fair use analyses of repair explained, “a finding of fair use is not necessarily precluded when the new use coincides generally with the original use of a work.” 2015 Recommendation at 234.

After reviewing the opposition comments, the record from the previous rulemaking, and the Supreme Court’s decision, the Office concludes that its fair use analysis for repair of medical devices and systems remains sound. The *Warhol* decision does not, as MITA and Philips suggest, substantially change how the Office would analyze the particular uses at issue—diagnosis, maintenance, and repair of medical devices and systems—under the first factor. The opposition comments point to language in the Court’s decision explaining that uses that “share the same or highly similar purposes” as the copyrighted work weigh against fair use.¹²³ But this statement echoes the Court’s earlier finding in *Campbell v. Acuff-Rose Music, Inc.* that the first factor focuses on whether a use “supplant[s] the original” or “instead add something new, with a further purpose or different character.”¹²⁴ It also mirrors the Court’s discussion in *Google LLC v. Oracle America, Inc.*, where it cited *Campbell* and explained that the first factor asks whether the use “add[s] something new, with a further purpose or different character,” and that “the word ‘transformative’ [] describe[s] a copying use that adds something new and important” and is therefore more likely to be fair.¹²⁵ The *Warhol* opinion did not overrule these prior decisions, but rather built upon them.¹²⁶ Nothing in the opinion changes the Office’s evaluation of the differences in purpose between the uses covered by the exemption and the intended use of the software. Accordingly, the

¹²³ MITA Medical Device Repair Opp. at 4 (quoting *Warhol*, 143 S. Ct. at 1277).

¹²⁴ 510 U.S. 569, 579 (1994). Further, to the extent to which opponents read *Campbell* to require that a new use add “new expression, meaning or message” to be considered fair, see MITA Medical Device Repair Opp. at 4, the Court in *Warhol* clarified that “meaning or message [i]s simply relevant to whether the new use serve[s] a purpose distinct from the original, or instead supersede[s] its objects,” not determinative or required. *Warhol*, 143 S. Ct. at 1282–83 (citing *Campbell*, 510 U.S. at 579).

¹²⁵ 141 S. Ct. 1183, 1202–03 (2021) (quoting *Campbell*, 510 U.S. at 579).

¹²⁶ For this reason, the Eleventh Circuit recently denied a motion for rehearing in a case involving fair use decided prior to the *Warhol* opinion—that court concluded that the intervening Supreme Court opinion did not affect its analysis of transformativeness under the first fair use factor or the “balance of the four factors.” *Apple Inc. v. Corellium, Inc.*, No. 21-12835, 2023 U.S. App. LEXIS 22252, at *3 (11th Cir. Aug. 23, 2023) (denying petition for rehearing and rehearing en banc).

decision is not a basis to question the reliability of the 2021 rulemaking record that resulted in the exemption for repair of medical devices and systems.

Based on the information provided in the renewal petitions and the lack of evidence in the opposition comments that the factual or legal record has changed in relevant ways, the Office believes that the conditions that led to adoption of this exemption are likely to continue during the next triennial period. Accordingly, it intends to recommend renewal.

R. Computer Programs—Security Research

Multiple organizations and security researchers submitted four petitions to renew the exemption permitting circumvention for purposes of good-faith security research (codified at 37 CFR 201.40(b)(16)).¹²⁷ No oppositions were filed against renewal, and one comment was received in support filed by “A Group of Hackers at DEF CON.”¹²⁸

The petitions include statements regarding the continuing need and justification for the exemption based on personal knowledge. For example, a petition from Professor J. Alex Halderman and Associate Professor Matthew D. Green states that security research “play[s] a vital role in [cybersecurity],” as “vulnerability disclosure and remediation are key to securing existing infrastructure.”¹²⁹ The petition from Professors Matt Blaze and Steven Bellovin asserts that the exemption remains necessary because in the past three years “one of us has continued to receive threats of prospective litigation from copyright holders in connection with his security research on software in voting systems.”¹³⁰ Additionally, the vehicle suppliers association MEMA states that its

¹²⁷ Blaze & Bellovin Security Research Renewal Pet.; Halderman & Green Security Research Renewal Pet.; MEMA Security Research Renewal Pet.; SFC Security Research Renewal Pet.

¹²⁸ A Group of Hackers at DEFCON Security Research Supp. (noting that the exemption has led to “the creation of software to fix vulnerabilities, as well as papers and presentations on security research”).

¹²⁹ Halderman & Green Security Research Renewal Pet. at 3.

¹³⁰ Blaze & Bellovin Security Research Renewal Pet. at 3.

membership “has seen firsthand that the exemption is helping encourage innovation in the automotive industry while mitigating risks to intellectual property and vehicle safety.”¹³¹ Finally, SFC asserts that the exemption continues to be used by “privacy and security researchers who investigate and publish information about privacy flaws in computing devices; and individual consumers and hobbyists who wish to prevent their private data from being disclosed by the devices they own.”¹³²

Based on the information provided in the renewal petitions and the lack of opposition, the Office believes that the conditions that led to adoption of this exemption are likely to continue during the next triennial period. Accordingly, it intends to recommend renewal.

S. Computer Programs—Video Game Preservation

The Software Preservation Network (“SPN”) and LCA jointly petition to renew the exemption for individual play by gamers and preservation of video games by a library, archives, or museum for which outside server support has been discontinued, and preservation by a library, archives, and museum, of discontinued video games that never required server support (codified at 37 CFR 201.40(b)(17)).¹³³ No oppositions were filed against renewal, and one individual filed a comment in support of the petition.¹³⁴

The petition states that libraries, archives, and museums continue to need the exemption to preserve video games, which is “an ongoing [and] iterative process.”¹³⁵ For example, it cites The Strong National Museum of Play, which has a “substantial number of TPM-encumbered video games in its collections that will need preservation treatment

¹³¹ MEMA Security Research Renewal Pet. at 3.

¹³² SFC Security Research Renewal Pet. at 3.

¹³³ SPN & LCA Abandoned Video Game Renewal Pet.

¹³⁴ Burt Abandoned Video Game Supp.

¹³⁵ SPN & LCA Abandoned Video Games Renewal Pet. at 3.

that requires circumvention in the coming years.”¹³⁶ In addition, the petition asserts that video game collection librarians “report a similar ongoing need,” which “has become a crucial tool in their ongoing efforts to save digital game culture before it disappears.”¹³⁷ The petitioners have personal knowledge of and experience with this exemption through their past participation in the triennial rulemaking proceedings, as well as through their representation of members that have relied on this exemption.

Based on the information provided in the renewal petition and the lack of opposition, the Office believes that the conditions that led to adoption of this exemption are likely to continue during the next triennial period. Accordingly, it intends to recommend renewal.

T. Computer Programs—Software Preservation

SPN and LCA jointly petition to renew the exemption for computer programs, other than video games, for the preservation of computer programs and computer program-dependent materials by libraries, archives, and museums (codified at 37 CFR 201.40(b)(18)).¹³⁸ No oppositions were filed against renewal, and one individual supported the petition.¹³⁹

Petitioners state that libraries, archives, and museums continue to need the exemption to preserve and curate software and materials dependent on software, which is “an ongoing [and] iterative process.”¹⁴⁰ For example, a software preservation analyst found “remote access to digital collections [a]s an increasingly explicit directive to fulfill cultural heritage institutions’ missions to support research, analysis, and other scholarly

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ SPN & LCA Software Preservation Renewal Pet.

¹³⁹ Burt Software Preservation Supp.

¹⁴⁰ SPN & LCA Software Preservation Renewal Pet. at 3.

re-use of the historical record (and to do so equitably and inclusively).”¹⁴¹ The petition also asserts that SPN’s members are providing an off-site researcher with “access to born-digital materials using remote access to legacy software.”¹⁴² The petitioners have personal knowledge of and experience with this exemption through their past participation in the triennial rulemaking proceedings, as well as through their representation of members that have relied on this exemption.

Based on the information provided in the renewal petition and the lack of opposition, the Office believes that the conditions that led to adoption of this exemption are likely to continue during the next triennial period. Accordingly, it intends to recommend renewal.

U. Computer Programs—3D Printing

Michael Weinberg petitions to renew the exemption for computer programs that operate 3D printers to allow use of alternative material (codified at 37 CFR 201.40(b)(19)).¹⁴³ No oppositions were filed against renewal.

The petition states that there is a continuing need and justification for the exemption, and the petitioner has personal knowledge of and experience with this exemption as the individual who participated in previous rulemakings. Mr. Weinberg declares that he is a member of the 3D printing community and has been involved with this exemption request during each cycle it has been considered by the Office.¹⁴⁴ In addition, he states that while 3D printers “continue to use TPMs to limit the types of materials used in printers,” since the last rulemaking proceeding, there has been “an

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ Weinberg 3D Printers Renewal Pet.

¹⁴⁴ *Id.* at 3.

expansion of third-party materials available for 3D printers” due to the current exemption.¹⁴⁵

Based on the information provided in the renewal petition and the lack of opposition, the Office believes that the conditions that led to adoption of this exemption are likely to continue during the next triennial period. Accordingly, it intends to recommend renewal.

V. Computer Programs—Copyright License Investigation

SFC petitions to renew the exemption for computer programs, for the purpose of investigating potential infringement of free and open source computer programs (codified at 37 CFR 201.40(b)(20)).¹⁴⁶ No oppositions were filed against renewal.

The petition argues that there is a continuing need and justification for the exemption, including by discussing how technological protection measures, such as encryption, “prevent[] the investigation of computer programs” within various devices that use free and open source software (“FOSS”) to operate.¹⁴⁷ The petition also evidences personal knowledge of the exemption. For example, it describes how SFC is informed of suspected non-compliance with the FOSS license, which it investigates on behalf of its members. Due to the “pervasive[ness]” of infringement through license non-compliance, however, “SFC can only pursue a fraction of the suspected infringements reported to it.”¹⁴⁸ SFC also participated in the previous rulemaking and provided the rulemaking record that led to the Office recommending the exemption.

Based on the information provided in the renewal petition and the lack of opposition, the Office believes that the conditions that led to adoption of this exemption

¹⁴⁵ *Id.*

¹⁴⁶ SFC Copyright License Investigation Renewal Pet.

¹⁴⁷ *Id.* at 3.

¹⁴⁸ *Id.*

are likely to continue during the next triennial period. Accordingly, it intends to recommend renewal.

III. Analysis and Classification of Proposed New or Expanded Exemptions

In addition to petitions to renew existing exemptions, the Office received eleven petitions for new or expanded exemptions.¹⁴⁹ The Office has reviewed and consolidated related and/or overlapping proposed exemptions to simplify the rulemaking process and encourage joint participation among parties with common interests (although collaboration is not required).¹⁵⁰ This has resulted in seven proposed classes of works.

Each proposed class is briefly described below, and additional information can be found in the underlying petitions posted on the Office website. As explained in the NOI, the proposed classes represent “‘only a starting point for further consideration in the rulemaking proceeding,’ and will be subject to ‘further refinement based on the record.’”¹⁵¹ The description of each class also includes preliminary legal and factual areas of interest that the Office hopes commenters will address in their submissions. These early observations are offered without prejudice to the Office’s ability to raise other questions or concerns at later stages of the proceeding, and commenters should offer all legal arguments and evidence they believe necessary to create a complete record. Finally, the Office reminds exemption proponents that “where an exemption request resurrects legal or factual arguments that have been previously rejected, the Office will continue to rely on past reasoning to dismiss such arguments in the absence of new information.”¹⁵²

¹⁴⁹ The Office received ten petitions for new classes. As discussed above, the Office has treated OTW’s renewal petition proposing amended regulatory language as the eleventh petition.

¹⁵⁰ 2023 NOI at 37489.

¹⁵¹ *Id.* (quoting *Exemptions to Permit Circumvention of Access Controls on Copyrighted Works*, 85 FR 37399, 37402 (June 22, 2020)).

¹⁵² Section 1201 Study at 147; see also *Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies*, 79 FR 55687, 55690 (Sept. 17, 2014).

Proposed Class 1: Audiovisual Works—Noncommercial Videos

OTW filed a renewal petition requesting that the exemption for circumvention of access controls protecting motion pictures on DVDs, Blu-ray discs, and digitally transmitted video for purposes of criticism and comment, for use in noncommercial videos be amended to align with the language of the 2010 exemption for clarity.¹⁵³ OTW contends that “[t]he complexity of the current [exemption] provisions substantially increases the difficulty of communicating and implementing the exemptions in practice,” and that reverting to the 2010 language would not expand the scope of the existing exemption, but merely help “clarify [it] for ordinary users.”¹⁵⁴ Since 2010, the exemption has been expanded to encompass works on a Blu-ray disc or received via a digital transmission, and to clarify it includes “videos produced for a paid commission if the commissioning entity’s use is noncommercial.”¹⁵⁵

OTW made the same request to amend the language of the exemption in the previous rulemaking.¹⁵⁶ The Office ultimately concluded that modification of the language was unnecessary,¹⁵⁷ based on statements by OTW to that effect.¹⁵⁸ The Office seeks comment on whether there are legal or factual circumstances that have changed and warrant altering the determination from the prior rulemaking.

Proposed Class 2: Audiovisual Works—Online Learning

Peter Decherney, Sarah Banet-Weiser, Shiv Gaglani, and SCMS (collectively “Joint Educators”) petition to expand the existing exemption for circumvention of access

¹⁵³ OTW Class 1 Pet. at 4 (discussing rulemaking cycle that began in 2008 and concluded in 2010).

¹⁵⁴ *Id.*

¹⁵⁵ 37 CFR 201.40(b)(1). *See* 2015 Recommendation at 103–06 (expanding the exemption to include Blu-ray and digital transmission).

¹⁵⁶ *See* 2021 OTW Class 1 Pet.

¹⁵⁷ *See* 2021 Recommendation at 40–42.

¹⁵⁸ *See id.* at 42 (“[W]e actually don’t think that any change is necessary” to the exemption requirement that motion pictures used under the exemption be “lawfully made and acquired.” (quoting 2021 Hearing Tr. at 245:21–24 (Apr. 6, 2021) (Betsy Rosenblatt, OTW))).

controls protecting motion pictures on DVDs, Blu-ray discs, and digitally transmitted video for educational purposes in massive open online courses (“MOOCs”) by faculty and employees acting at the direction of faculty of accredited nonprofit educational institutions.¹⁵⁹ In their petition, Joint Educators request that the exemption be extended to cover other online learning platforms that offer “supplemental education, upskilling, retraining and lifelong learning,” such as Khan Academy, LinkedIn Learning, Osmosis.org, and Code.org.¹⁶⁰ Joint Educators propose allowing “educators and preparers of online learning materials offered by educational entities to use short excerpts of motion pictures (including television shows and videos) for the purpose of criticism, comment, illustration and explanation in offerings to registered learners of online learning platforms when use of the excerpts will contribute significantly to learning.”¹⁶¹ Joint Educators contend that, since the last proceeding, the demand for online learning has “continued to skyrocket,” with educational institutions using a variety of online learning platforms to supplement their curricula.¹⁶² They note that the current exemption for online learning only applies to a limited scope of learning settings (*i.e.*, MOOCs developed at accredited educational institutions).

The Office notes, that in the last two rulemakings, it received proposals to expand the existing exemption for online learning to for-profit entities (including “online learning platforms”) and unaccredited educational institutions. During those rulemakings, the Office considered and ultimately recommended against these proposals.¹⁶³ The Office seeks comment on whether any changed legal or factual circumstances warrant altering that determination and whether, or to what extent, commenters believe the proposed

¹⁵⁹ Joint Educators Class 2 Pet.

¹⁶⁰ *Id.* at 2.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ See 2021 Recommendation at 49–52; 2018 Recommendation at 53–55.

language should be adopted. As part of this analysis, commenters should discuss the extent to which the evidence submitted in prior rulemakings may be relied upon to support the expansion.

Proposed Classes 3(a): Motion Pictures and 3(b): Literary Works—Text and Data Mining

Authors Alliance, AAUP, and LCA filed two petitions to expand the exemptions for text and data mining on a corpora of motion pictures and literary works for the purpose of scholarly research and teaching.¹⁶⁴ Petitioners propose expanding each exemption to permit “researchers to share corpora with researchers affiliated with different nonprofit institutions of higher education for purposes of conducting independent text data mining research and teaching, where those researchers are in compliance with the [current] exemption.”¹⁶⁵ Petitioners explain that, under their petitions, all provisions of the current exemptions would remain the same with the only change being the expansion of the types of users who would have access to motion pictures and literary works.¹⁶⁶

For reasons of administrative efficiency, the Office has grouped these proposals into one category that encompasses two proposed classes pertaining to motion pictures and literary works, respectively (*i.e.*, Classes 3(a) and 3(b)). Commenters addressing these proposals may submit a single comment addressing both motion pictures and literary works, but the supporting evidence must be sufficient to establish an adverse effect on noninfringing uses with respect to each. To the extent commenters believe the relevant factual and legal issues are similar as to the two classes of works, the supporting

¹⁶⁴ Authors Alliance, AAUP & LCA Class 3(a) Pet.; Authors Alliance, AAUP & LCA Class 3(b) Pet.

¹⁶⁵ Authors Alliance, AAUP & LCA Class 3(a) Pet. at 2; Authors Alliance, AAUP & LCA Class 3(b) Pet. at 2.

¹⁶⁶ Authors Alliance, AAUP & LCA Class 3(a) Pet. at 2–3; Authors Alliance, AAUP & LCA Class 3(b) Pet. at 2–3.

comments should describe them in detail. For example, commenters may wish to address the extent to which there is overlap with respect to the types of TPMs applied to these works, the nature of the proposed research activities, the relevant markets for the works, and the availability of potential alternatives to circumvention. Commenters may also wish to discuss whether this exemption should be analyzed as a request to engage in new circumvention activities not permitted by the current exemption or as a modification to post-circumvention limitations, and to what extent the Office’s previous analysis of noninfringement and adverse effects apply to this class.

Proposed Class 4: Computer Programs—Generative AI Research

Jonathan Weiss proposes a new exemption to circumvent technological measures that control access to “copyrighted generative AI models, solely for the purpose of researching biases” within the models.¹⁶⁷ The proposed exemption would permit sharing the research, techniques, and methodologies that “expose and address biases,” and ensure, among other reasons, fairness and transparency within AI models and their development.¹⁶⁸ The petition does not cabin the proposed exemption to a specific set of users, only describing them as “researchers” and does not discuss how TPMs prohibit, or are likely to prohibit, researchers from accessing the software within the generative AI models.¹⁶⁹ Instead, Weiss submits three guardrails to prevent misuse of the proposed exemption: the exemption applies only where the “primary intention is to identify and address biases, and not to exploit them;” any research “prioritize[s] data privacy, ensuring that no personal or sensitive data is compromised;” and researchers should “actively engage with AI developers and stakeholders to address discovered biases.”¹⁷⁰

¹⁶⁷ Weiss Class 4 Pet.

¹⁶⁸ *Id.* at 2.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 3.

In general, the Office seeks comment on whether the proposed exemption should be adopted, including any proposed regulatory language. Commenters should describe with specificity the relevant TPMs and whether their presence is adversely affecting noninfringing uses, including identifying whether eligible users may access the software through alternate channels that do not require circumvention and the legal basis for concluding that the proposed uses are likely to be noninfringing.

Proposed Class 5: Computer Programs—Repair

Two organizations jointly petition for an expanded exemption relating to the diagnosis, maintenance, and repair of computer programs that control devices designed primarily for use by consumers.¹⁷¹ Public Knowledge and iFixit petition for an expansion to “include commercial industrial equipment such as automated building management systems and industrial equipment (i.e. soft serve ice cream machines and other industrial kitchen equipment).”¹⁷² The petition includes examples of how “service passwords and digital locks” are preventing diagnosing, maintaining, and repairing the software within the devices.¹⁷³

The Office notes that in the last rulemaking, it declined to include commercial and industrial devices and systems within the scope of the proposed repair class due to a lack of evidence of adverse effects for such uses and because “it [was] not apparent from the record that users of commercial and industrial systems are similarly situated to users of consumer products.”¹⁷⁴ The Office invites comment on whether users of commercial

¹⁷¹ Public Knowledge and iFixit Class 5 Pet.

¹⁷² *Id.* at 2.

¹⁷³ *Id.*

¹⁷⁴ 2021 Recommendation at 194–98 (“Without a more developed record concerning devices designed primarily for commercial and industrial use, the Register cannot properly evaluate the purported similarities to consumer devices or analyze the claimed adverse effects.” (citing FTC, Nixing the Fix: An FTC Report to Congress on Repair Restrictions 51 (May 2021), https://www.ftc.gov/system/files/documents/reports/nixing-fix-ftc-report-congress-repair-restrictions/nixing_the_fix_report_final_5521_630pm-508_002.pdf)).

and industrial equipment are similarly situated to or distinct from users of software-enabled consumer devices; whether commercial and industrial devices and systems can be the basis of an exemption for a single “class of works;” whether diagnosis, maintenance, and repair of such devices and systems are likely to be noninfringing uses of their firmware; and whether TPMs are adversely affecting those uses.

**Proposed Classes 6(a): Computer Programs and 6(b): Video Games—
Preservation**

Three petitions seek to expand the current exemptions for preservation of software and video games, and one petition seeks a new exemption for preservation of video games.¹⁷⁵ As with the proposed text and data mining exemptions, the Office has grouped these petitions into a single category encompassing two proposed classes. Commenters addressing these proposals may submit a single comment addressing both computer programs and video games, but the supporting evidence must be sufficient to establish the statutory requirements with respect to each category of works.

SPN and LCA filed a petition to expand the current exemption for preservation of software by eligible libraries, archives, and museums by removing the current requirement that electronic distribution, display, or performance of software be made to “only . . . one eligible user at a time.”¹⁷⁶ SPN and LCA and Thomas Sullivan filed petitions to expand the current exemption for preservation of video games by eligible libraries, archives, and museums by removing the current requirement that video games “not be distributed or made available outside of the physical premises of an eligible [library, archives, or museum].”¹⁷⁷ Finally, Ken Austin petitions for a new exemption that

¹⁷⁵ SPN & LCA Class 6(a) Pet.; Austin Class 6(b) Pet.; SPN & LCA Class 6(b) Pet.; Sullivan Class 6(b) Pet.

¹⁷⁶ SPN & LCA Class 6(a) Pet. at 2; 37 CFR 201.40(b)(18).

¹⁷⁷ SPN & LCA Class 6(b) Pet.; Sullivan Class 6(b) Pet.; 37 CFR 201.40(b)(17). Sullivan’s petition also proposes an expansion of those permitted to engage in preservation, such as

would permit circumvention by “individual owners of video games which have DRM (digital rights management) that no longer function[] due to incompatibility” with modern computers’ operating systems.¹⁷⁸ Mr. Austin provides an example of the Windows 10 operating system preventing individuals from playing an old video game because the game’s technological protection measures are flagged as a security threat.¹⁷⁹

The Office notes that it has previously considered and rejected many of these requests. In the last rulemaking, it rejected removing the one-user limit on software preservation out of concern with substitution risk,¹⁸⁰ and declined to recommend removing the on-premises limitation for video game preservation.¹⁸¹ The Office therefore seeks comment on whether there have been new factual or legal developments since the last rulemaking that would support a new recommendation for the preservation exemptions. Separately, it invites comment on the proposed exemption for individuals whose video games are no longer functional due to incompatibility with their computer’s operating systems. Specifically, the Office seeks comment on the relevant TPMs and whether their presence is adversely affecting noninfringing uses, including identifying whether eligible users may access the software through alternate channels that do not require circumvention and the legal basis for concluding that the proposed uses are likely to be noninfringing.

“[c]olleges, [u]niversities, . . . and any institution dedicated to the preservation of video games.” Sullivan Class 6(b) Pet. at 2.

¹⁷⁸ Austin Class 6(b) Pet at 2.

¹⁷⁹ *Id.*

¹⁸⁰ 2021 Recommendation at 268–73, 279 (“[T]he inclusion of single user and limited time restrictions will minimize the risk of substitutional use of the software.” (citing U.S. Copyright Office, Section 108 of Title 17: A Discussion Document of the Register of Copyrights 38–39 (2017), <https://www.copyright.gov/policy/section108/discussion-document.pdf>)).

¹⁸¹ See *id.* at 271–275, 279; see also 2018 Recommendation at 271–75, 278; 2015 Recommendation at 340–44, 351–52.

Proposed Class 7: Computer Programs—Vehicle Operational Data

MEMA petitions for a new exemption to “access, store, and share vehicle operational data, including diagnostic and telematics data” from “a lawfully acquired motorized land vehicle or marine vessel such as a personal automobile or boat, commercial vehicle or vessel, or mechanized agricultural vehicle or vessel.”¹⁸² The petition limits circumvention to “lawful vehicle owners and lessees, or those acting on their behalf.”¹⁸³

The Office encourages proponents to develop the legal and factual administrative record in their initial submissions, including describing with specificity the relevant TPMs and whether their presence is adversely affecting noninfringing uses, whether eligible users may access such data through alternate channels that do not require circumvention, and the legal basis for concluding that the proposed uses are likely to be noninfringing. In general, the Office seeks comment on whether the proposed exemption should be adopted, including any proposed regulatory language.

IV. Future Phases of the Ninth Triennial Rulemaking

As in prior rulemakings, the Office will solicit public engagement to create a comprehensive record through receipt of written comments, public hearings, post-hearing questions, and *ex parte* meetings. Each future phase of the administrative process is described below.

A. Submission of Written Comments

Parties wishing to address proposed exemptions in written comments should familiarize themselves with the substantive legal and evidentiary standards for the granting of an exemption under section 1201(a)(1), which are described in more detail on

¹⁸² MEMA Class 7 Pet.

¹⁸³ *Id.* at 2.

the Office's form for submissions of longer comments, available on its website. In addressing factual matters, commenters should be aware that the Office favors specific, "real-world" examples supported by evidence over hypothetical observations. In cases where the technology at issue is not apparent from the requested exemption, it is helpful for commenters to describe the TPM(s) that control access to the work and the method of circumvention.

Commenters' legal analysis should explain why the proposal meets or fails to meet the criteria for an exemption under section 1201(a)(1), including, without limitation, why the uses sought are or are not noninfringing as a matter of law. The legal analysis should also discuss statutory or other legal provisions that could impact the necessity for or scope of the proposed exemption. Legal assertions should be supported by statutory citations, relevant case law, and other pertinent authority. In cases where a class proposes to expand an existing exemption, participants should focus their comments on the legal and evidentiary bases for modifying the exemption, rather than the underlying exemption. As discussed above, the Office currently is inclined to recommend all but one current temporary exemption for renewal.¹⁸⁴

To ensure a clear and definite record for each of the proposals, separate submissions must be submitted for each proposed class and not combined. Accordingly, the same party may submit multiple written comments on different proposals. The Office acknowledges that the requirement of separate submissions may require commenters to repeat certain information across multiple submissions, but the Office believes that the administrative benefits of creating a self-contained, separate record for each proposal justify the modest amount of added effort.

¹⁸⁴ The Office will not recommend renewal of the current exemption permitting circumvention of video games in the form of computer programs for the purpose of allowing an individual with a physical disability to use alternative software or hardware input methods within 37 CFR 201.40(b)(21).

The first round of public comment is limited to submissions from proponents (*i.e.*, those parties who proposed new exemptions during the petition phase) and other members of the public who support the adoption of a proposed exemption, as well as any members of the public who neither support nor oppose an exemption but seek only to share pertinent information. Proponents of exemptions should present their complete affirmative case for an exemption during the initial round of public comment, including all legal and evidentiary support.

The second round of public comment seeks comments from members of the public who oppose an exemption. As with the first round, commenters during the second round should present the full legal and evidentiary basis for their opposition. Finally, the third round of public comment will be limited to supporters of particular proposals and those who neither support nor oppose a proposal, who seek to reply to points made in the earlier rounds of comments. Reply comments should not raise new issues, but should instead be limited to addressing arguments and evidence presented by others during prior rounds.

B. Public Hearings

After the three rounds of comments are completed, the Copyright Office will hold virtual public hearings in spring 2024. The hearings will allow for participation by videoconference and will be streamed online. A separate notice providing details about the hearings and how to participate will be published in the *Federal Register* at a later date. The Office will identify specific items of inquiry to be addressed during the hearings.

C. Post-Hearing Questions

As with previous rulemakings, following the hearings, the Office may request additional information with respect to particular classes from rulemaking participants, to supply missing information for the record or otherwise resolve issues that it believes are

material to particular exemptions. Such requests for information will take the form of a letter from the Office, will be addressed to individual parties involved in the proposal as to which more information is sought, and will provide a deadline for submission. Responding to such a request will be voluntary. After the receipt of all responses, the Office will post the questions and responses on the Office's website as part of the public record.

D. *Ex Parte* Communication

In the last two proceedings, in response to stakeholder requests, the Office provided written guidelines under which interested non-governmental participants could request informal communications with the Office during the post-hearing phase of the proceeding. In this proceeding, the Office will permit *ex parte* communications, but participating parties will be required to follow its regulations on *ex parte* communications, codified at 37 CFR 201.1(d) and 205.24.¹⁸⁵ In accordance with the regulations, and similar to the last two proceedings, no *ex parte* communications with the Office regarding this proceeding will be permitted prior to the post-hearing phase.

Dated: October 12, 2023.

Suzanne V. Wilson,
General Counsel and Associate Register of
Copyrights

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¹⁸⁵ See 37 CFR 201.1(d), 205.24.